Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Accelerating Wireless Broadband	)	**WC Docket No. 17-79**
Deployment by Removing Barriers	)	
To Infrastructure Investment	)	

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's (FCC) rules, the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments responding to June 15 initial comments filed in response to the Federal Communications Commission's (FCC) April 21, 2017 Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry (NOI) seeking to remove regulatory barriers to wireless broadband infrastructure in the above-captioned proceeding. [1] These reply comments generally endorse and amplify several arguments presented in the initial comments of the California Public Utility Commission[2] which line up with NARUC's February 2017

[1] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WC Docket No. 17-79, FCC 17-38 (Released April 21, 2017), at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-37A1.docx; Published at 82 Federal Register 21761 (May 10, 2017).

[2] *See,* Comments of the California Public Utilities Commission, filed June 15, 2017: *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79 *online at: https://ecfsapi.fcc.gov/file/10616232699616/Docket%20Nos.%2017-84%2C%2017-79%20Comment.pdf* (CPUC Comments).

Resolution on Federalism and the Mobilitie Petition and NARUC's June 15, 2017[3] and March 8, 2017[4] comments in related proceedings on the same or similar issues.

Consistent with those documents, NARUC opposes "any preemption that supplants State regulation of intrastate telecommunications with FCC mandates." NARUC has not had an opportunity to take detailed positions responding to all the questions raised by the NPRM and NOI. But our existing resolutions make clear that the FCC should be careful to respect the clear limits on its authority imposed by the plain text of the federal telecommunications law.

---

[3] *See,* Appendix A; *See also*, Comments of the National Association of Regulatory Utility Commissioners, filed June 15, 2017: *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment, WC Docket No. 17-84, at: https://ecfsapi.fcc.gov/file/106151758516325/17%200615%20NARUC%20Initial%20Comments%20Wireline%20NPRM.pdf*.

[4] *See,* Comments of the National Association of Regulatory Utility Commissioners, filed March 8, 2017: *In the Matter of Streamlining Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, at https://ecfsapi.fcc.gov/file/1030960985427/17%200308%20NARUC%20Initial%20Comments%20Motilitie%20petition.pdf. Among other things, those comments at pp. 4 -7, outline the dearth of empirical data that a problem exists with wireless deployment. There is simply no statistical record to justify FCC intervention. *See,* Gibbs, Colin, *Mobilitie Downplays Small Cell Concerns, Says Sprint Really is Spending on Network Upgrades*, FierceWireless (June 22, 2016) http://www.fiercewireless.com/wireless/mobilitie-downplays-small-cell-concerns-says-sprint-really-spending-network-upgrades (last accessed March 8, 2017). ("Finally, from Mobilitie, we heard a very contrarian and constructive view on Sprint's network initiatives," Jennifer Fritzsche of Wells Fargo wrote in a research note. "Mobilitie did indicate despite all the noise out there, *it is getting through the zoning and permitting stage much faster than the market appreciates* and *there have been no municipalities that have pushed a full-on moratorium on small cell deployment as some have speculated.*" (Emphasis added).) Cf. Mobilitie petition, filed in WT Docket 15-421, at p. 14, noting the company "has concluded rights-of-way agreements" with Los Angeles, CA, Anaheim, CA, Minneapolis, MN, Overland Park, KS, Olathe, KS, Independence, MO, Newark, NJ, Union City, NJ, Bismark, ND, Price, UT, Racine, WI, and Wautawtosa, WI – vs. unspecified problems with "many other localities." NARUC also pointed out that, given the stage in 5G facilities deployments thus far, it is unlikely the industry can compile sufficient data to demonstrate a wide-spread problem exists. Heretofore, the wireless tower industry has, under current laws, in the view of at least one analyst, "grown rapidly." See, *Market Realist, An Overview of the Wireless Tower Industry*, by Steve Sage, January 11, 2016, at http://marketrealist.com/2016/01/overview-wireless-tower-industry/. But other than anecdotal data, no one has provided statistical data that the current process either is not working or will not work.

DISCUSSION

In the *Notice of Inquiry (NOI)*, at ¶¶ 87 – 97 the Commission seeks comment on the proper interpretation of § 253(a) and § 332(c)(7).

The CPUC Comments urge the Commission to follow the plain text of the statute. As a preliminary matter, the plain text of the statute requires both Courts and the FCC, in construing both these provisions, not to imply preemption. Section 601(c)(1) of the 1996 Act**,** captioned "NO IMPLIED EFFECT", is, on its face a Congressional mandate on how the Act is to be construed. It provides "[t]he amendments made by this Act *shall not be construed to modify, impair, or supersede . . . State*, or local *law unless expressly so provided in such Act or amendments*." {*emphasis added*} Obviously, § 601(c)(1), by its express terms, requires the FCC to "construe" preemptive portions of the Act narrowly and reservations of State authority broadly. As then "Commissioner" Pai noted in a March 12, 2015 dissent, § 601(c) "counsel[s] against any broad construction" of the 1996 Act "that would create an implicit conflict with state [] law."[5]

Moreover, the FCC's authority to preempt under § 253(a) is expressly limited to carriers providing "telecommunications services" as defined elsewhere in the Act.

---

[5] Dissenting Statement of Commissioner Ajit Pai, *In the Matters of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.,* WC Docket No. 14-115, *The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Docket No. 14-116, rel. March 12, 2015, *mimeo at 7*, available online at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-25A5.pdf.

Like the Ninth Circuit,[6] NARUC finds persuasive the Eighth Circuit's criticism of a broad interpretation of § 253(a):

> "Section 253(a) provides that "[n]o State or local statute or regulation ... may prohibit or have the effect of prohibiting ... provi[sion of] ... telecommunications service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns,* 477 F.3d at 532. Although our conclusion rests on the unambiguous text of § 253(a), we note that our interpretation is consistent with the FCC's. *See In re Cal. Payphone Ass'n,* 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation "would have to actually prohibit or effectively prohibit" the provision of services)"

Sprint Telephony PCS, L.P. v. City of San Diego, 543 F.3d 571, 577–78 (9th Cir. 2008)

The CPUC Comments also point out, at p. 10, that the plain text of § 253(d) does not give the FCC the power to generally preempt state and local regulations, explaining:

> Section 253(d) provides: "[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement"

[6] And the First, Fourth and Seventh Circuits, which the NOI correctly points out in ¶ 91, "have imposed a "heavy burden" of proof on applicants to establish a lack of alternative feasible sites, requiring them to show "not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try."

> that has the effect of prohibiting service, that is not competitively neutral, or that violates the universal service rules, "the Commission shall preempt the enforcement of such statute, regulation, or legal requirement *to the extent necessary to correct such violation or inconsistency*." That language obliges the FCC to examine the specific state or local requirement at issue, to determine whether its enforcement—not the requirement writ large—is inconsistent with Section 253, and if the FCC makes such a determination, it must craft relief that is narrowly tailored to fix the problem. That process is unsuited to rulemaking, which "involve[s] broad applications of more general principles" instead of the "case-specific individual determinations" at issue here.[]

NARUC agrees. It is obvious from the text of § 253(d)[7] that Congress meant the FCC to apply § 253(a) on a State-specific and law or regulation-specific basis.[8] As the CPUC Comments point out, Section 253(d) speaks in terms of "a state" and "such statutory or regulation" which is to be preempted "only to the extent necessary to correct such violation." Such text is hardly a prescription for general rules that apply to classes of different State regulations.[9]

---

[7] Section 253 (d), captioned "Preemption" notes that "[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

[8] *Compare*, *Town of Amherst v. Omnipoint Communications Enters*., Inc., 173 F.3d 9, 13 & n.3 (1st Cir. 1999) (discussing initial House version of provision that would have charged the FCC with developing a uniform national policy for the deployment of wireless communication towers that was rejected in favor of a bill that rejected such a blanket preemption of local land use authority).

[9] Indeed, the overwhelming majority of the judicial precedent cited in the NOI bypassed the FCC entirely and were, as Congress intended, brought directly to a court for a case-by-case determination of the impact of the particular State rules as applied in the specific circumstances presented.

Similarly, by specifically omitting any reference to the broad reservation of State authority in § 253(c), in § 253(d), Congress made clear that that reservation of State authority is to be construed, if at all, by a court, again on a case-by-case basis. That section is designed specifically to preserve State and local regulatory authority over managing public rights-of-way[10] and requiring fair compensation from "telecommunications providers." More than one court has pointed out that *only* Sections 253(a) and (b) may be preempted by the Commission under Section 253(d).[11]

This is borne out by the plain text of § 253 and confirmed by its legislative history. During debate on § 253, Senator Gorton offered an amendment containing the current language of the section, explaining:

> There is no preemption ... for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition ... that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.[12]

Later, Senator Gorton also pointed out that his amendment:

---

[10] Section 253(c) is only section raised in the NOI that even mentions the term "rights-of-way".

[11] *See, e.g., Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1266 (10th Cir. 2004); *Bell South Telecomm. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187-89 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 623 (6th Cir. 2000).

[12] 141 Cong. Rec. S8213 (1995).

> retains not only the right of the local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts. [13]

By giving the authority to enforce § 253(c) to the federal courts, not the Commission, Congress recognized not only the historic authority of state and local governments to manage their right-of-ways, but also that "fair and reasonable" compensation will vary by locality, and depend on a unique set of facts and circumstances. Again, this rather strongly demonstrates that any short of generic rulemaking addressing such issues would only complicate and perhaps extend any litigation over a specific State enactment.

The other section raised for comment by the NOI, § 332(c)(7) lack's § 253(d)'s express limitation of preemption to "only to the extent necessary to correct such violation." But it includes in § 332(c)(7)(A), the first subsection captioned "General Authority", an additional reminder that any preemption power outlined in the remainder of the section is to be construed narrowly:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

In any case, the FCC's authority under this section is even more limited and Congress again obviously designed the provision for a similar case specific

---

[13] 141 Cong. Rec. S8308 (1995).

approach. As § 332(7)(b)(i)(v) makes clear, the FCC cannot even hear a case under § 332(7)(b)(i) unless it's a §332(7)(b)(iv) zoning determination based on the "environmental effects of radio frequency emissions." All other cases must commence "in any court of competent jurisdiction."

Congress determined State and local governments are best situated to make such determinations, with the oversight of the federal district courts. The FCC should not override that determination.

At ¶ 89, the NOI also seeks comment on "whether there is any reason to conclude that the substantive obligations of these two provisions differ, and if so in what way" and on "the interaction" of the two provisions. The CPUC Comments did not address these questions directly. However, the interrelationship is obvious.

The § 253 (b) and (c) reservations apply unless there is some other provision that excludes them. No other provision of the Act does so – certainly not § 332(c).

Congress specified in § 253(e) that nothing in § 253 "shall affect the application of" § 332(c)**(3)** to commercial mobile service providers."[14] (emphasis added) Significantly, there is no similar Congressional limitation on the applicability of the specific reservations of State authority in § 253 (b) and (c) to § 332(c)**(7)**.

[14] The NOI does not seek comment on § 332(c)(3), which specifically preserves State authority over other terms and conditions of Commercial Mobile Radio Service, but limits State authority to set rates for such services to cases where the State can demonstrate to the FCC a market failure.

The clear text of the statute requires the § 253 (b) and (c) reservations of State authority to override the more general provisions of § 332(c)(7). It is no accident that §332(c)(7) fails to include provisions that would override the specific reservations in § 253(b) and (c).[15]

Section 332(c)(7), true to its caption - "Preservation of local zoning authority" - *focuses* specifically on zoning regulations. The conference agreement points out that the new section "prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matter except in the limited circumstances set forth in the conference agreement." It is a compromise between two competing goals (i) facilitating the growth of wireless services and (ii) maintaining substantial local control over tower siting."[16] As the Second Circuit, in *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 at 420 (2d Cir. 2002) pointed out:

> To begin with, the structure of § 332(c)'s paragraph (7) indicates that Congress meant preemption to be narrow and preservation of local governmental rights to be broad, for subparagraph (A) states that "*nothing* " in the FCA is to "limit or affect" local governmental decisions "*[e]xcept* as provided in this paragraph." 47 U.S.C. § 332(c)(7)(A) (emphases added). Thus, unless a limitation is provided

[15] Section 332(c) never references the terms rights-of-way, universal service, public safety and welfare, quality of service, rights of consumers, or compensation.

[16] *Town of Amherst v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 13 & n.3 (1st Cir. 1999) (Noting the initial House version of this provision charged the FCC with developing a uniform national policy for the deployment of wireless communication towers but the final bill rejected blanket preemption of local land use authority, but retained specific limitations.).

> in § 332(c)(7), we must infer that Congress's intent to preempt did not extend so far.

The limitations are spelled out in 47 U.S.C. § 332(c)(7)(b).

There is no mention of compensation – fair or otherwise. It only says that a State or local government's regulations on placement of personal wireless service facilities cannot "unreasonably discriminate among providers of functionally equivalent services" or "effectively prohibit the provision of personal wireless services." It is no surprise that Courts have ruled that § 332(c)(7) does not generally apply to local government actions or decisions relating to the siting of wireless facilities *on municipal property.*[17] That's because preemption doctrines generally apply only to State *regulation* and not when a State owns and manages property.[18] Those circumstances lay completely beyond the FCC's reach, as they should.

CONCLUSION

Sections 253 and 332(7), by their express terms, place clear limits on the exercise of FCC authority. Section 601(c)(1) requires the FCC to "construe"

---

[17] See, e.g., *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-19 (2d Cir. 2002):

> Not all actions by state or local government entities, however, constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace. "A State does not regulate ... simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation."*

Compare, *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192 (9th Cir. 2013)(Requirement for cellphone provider to obtain voter approval before constructing mobile telephone antennae on city-owned park property was not preempted.)

[18] See *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226-27 (1993) ("When a State owns and manages property … it must interact with private participants in the marketplace. In doing so, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation*.").

preemptive portions of the Act narrowly and reservations of State authority broadly. But even if that section did not apply, any reasonable reading of the two sections raised by the NOI compels the same result. Moreover, the record thus far does not provide a factual basis for any preemptive action. NARUC requests the FCC recognize these facts and eschew any formal action. Instead, the FCC should focus on Chairman Pai's new broadband deployment task force to come up with non-binding best practices to facilitate specific State consideration of telecommunications carriers' proposals.

Respectfully submitted,

James Bradford Ramsay
GENERAL COUNSEL
Jennifer Murphy
ASSISTANT GENERAL COUNSEL
National Association of Regulatory
Utility Commissioners
1101 Vermont Avenue, Suite 200
Washington, DC 20005
Telephone: 202.898.2207
E-mail: jramsay@naruc.org

DATED: July 17, 2017

Appendix A - *Resolution on Federalism and the Mobilitie Petition*

WHEREAS, The Federal Communications Commission (FCC) issued a Declaratory Ruling on November 18, 2009, at WT Docket No. 8-163, DA 09-99, establishing definite timeframes for State and local action on wireless facilities siting requests which, while preserving the authority of States and localities to make the ultimate determination on local zoning and land-use policies, adopted federal timelines of 90 days for collocation applications and 150 days for siting applications; *and*

WHEREAS, The FCC Declaratory Ruling of November 18, 2009, at WT Docket No. 8-163, DA 09-99 was upheld by the Supreme Court in *City of Arlington v. Federal Communications Commission,* 133 S. Ct. 1862 (2013) through application of the *Chevron* doctrine, a legal principle that defers to a federal agency's interpretation of law, to federal agency interpretations of their federal statutory authority; *and*

WHEREAS, The FCC adopted *In re: Connect America Fund* a Report and Order and Notice of Further Rulemaking in Docket 10-90 on November 18, 2011, 26 FCC Rcd 17663, 17973-74 (¶¶ 883-884) (FCC 11-161) (2011) *("USF/ICC Transformation Order" or "FNPRM")* proposing, among other things, to reform the federal universal service fund (USF) to revise existing high-cost support universal service mechanism and focus such support so as to deploy broadband network facilities capable of providing voice and broadband services to all Americans; *and*

WHEREAS, The *USF/ICC Transformation Order* preempted the States' traditional legal authority to establish rates for intrastate telecommunications access; *and*

WHEREAS, The FCC's preemption was upheld in its entirety by the federal courts in *In re FCC,* 753 F.3d 1015 (10th Cir. 2014), *petitions for rehearing en banc denied*, Aug. 27, 2014, *cert. denied*, 83 U.S.L.W. 3835, May 4, 2015 (Nos. 14-610, *et al*.); *and*

WHEREAS, Mobilitie, LLC filed a petition at WT Docket No. 16-421 addressing streamlining the deployment of small-cell infrastructure on November 15, 2016 (the Mobilitie Petition); *and*

WHEREAS, The FCC subsequently issued a Public Notice ("Public Notice") of the Mobilitie Petition on December 22, 2016 in Docket No. WT 16-421, DA 16-1427 stating that "[s]ections 253 and 332(c)(7) of the Communications Act and Section 6409(a) of the Spectrum Act are designed, among other purposes, to remove barriers to deployment of wireless network facilities by hastening the review and approval of siting applications by local land-use authorities"; *and*

WHEREAS, The FCC notice also asked for comments on how small cell deployment can be improved and expedited by the FCC issuing guidance on how federal law applies to local government review of wireless facility siting applications and local requirements for gaining access to rights of way, including requests for information on: 1) certain practices that prohibit or have the effect of prohibiting the provision of wireless service; 2) ways to improve the timeliness of right of way permit review; and 3) interpretation of the fair and reasonable compensation and non-discrimination requirements of 47 USC 253(c); *and*

WHEREAS, Prior decisions of the FCC in response to inquiries that examined State and local laws or policies, including those concerning facility siting or compensation, have resulted in truncating those State laws or policies, if not preempting them; *and*

WHEREAS, The general principles of federalism set out by the National Association of Regulatory Utility Commissioners (NARUC) in its 2013 Federalism Paper envision a joint federal-State partnership in, among other things, the deployment of broadband network facilities and service to all Americans; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2017 Winter Committee Meetings in Washington, D.C., reiterates its support for the federal-State partnership envisioned in its 2013 Federalism Paper; *and be it further*

RESOLVED, That, consistent with NARUC's 2013 Federalism Paper, NARUC urges the FCC to act consistently with the principles of federalism endorsed there as it applies to the federal-State partnership underway in the deployment of wireless and wireline facilities, including the deployment of small-cell infrastructure; *and be it further*

RESOLVED, That NARUC applauds the FCC and Chairman Ajit Pai for initiating the Broadband Deployment Advisory Committee (BDAC) and looks forward to an active role in that effort; *and be it further*

RESOLVED, That NARUC also encourages its members to engage State and local authorities managing rights-of-way, pole attachments, and other telecommunications facilities or services under examination in the Mobilitie Petition to understand the important role that public utility access provided by those State and local authorities plays in the deployment of the broadband infrastructure of public utilities; *and be it further*

RESOLVED, That NARUC opposes further efforts in petitions asking the FCC to preempt the traditional authority of the State and local authorities by replacing intrastate regulation of rights-of-way, Pole Attachments, and other telecommunications facilities or services of public utilities with comprehensive federal mandates imposed by the FCC; *and be it further*

RESOLVED, That NARUC directs the NARUC General Counsel, and urges fellow State members, to participate in FCC proceedings to oppose any preemption that supplants State regulation of intrastate telecommunications with FCC mandates and to provide input regarding the Public Notice that encourages the FCC to issue guidance, including what constitutes reasonable and nondiscriminatory and thus, permissible fees under federal law, consistent with the governing authority contained in federal law at 47 U.S.C. Section 332 and 47 U.S.C. Section 253 and the principles that State and local governments are charged with managing the public rights of way and that State and local governments must protect the health, safety, and welfare of their citizens.

_____

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors on February 15, 2017